FAIR POLITICAL PRACTICES COMMISSION

Memorandum

To: Chairman Getman and Commissioners Downey, Knox, Scott and Swanson

From: C. Scott Tocher, Commission Counsel Legal Division
Luisa Menchaca, General Counsel

Re: Prenotice Discussion of Regulatory Action Regarding Sections 85304 (Legal Defense Funds), 85308 (Contributions from Minors) and 85700 (Donor Information/Contribution Return); Proposed Regulations 18530.4, 18570

Date: May 23, 2001 [Rescheduled for Discussion at the July 9, 2001 Meeting]

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This memorandum serves to guide the Commission in its prenotice consideration of proposed regulations concerning three Government Code provisions recently enacted by Proposition 34. Each of these provisions was the subject of the Commission's recent opinion, *In re Pelham*, O-00-274. In the process of considering that opinion, and on the basis of feedback from the public, issues have arisen regarding implementation of these statutes. Staff has prepared the following brief discussion of the questions presented and, in certain cases, concomitant regulatory language. The Commission may choose to delay final decisions on some issues pending further input. If the Commission wishes to move forward, adoption of the regulations is contemplated for September or October of 2001.[1]

1. SECTION 85304[2] – LEGAL DEFENSE FUNDS

Overview

Section 85304 provides:

> "(a) A candidate for elective state office or an elected state officer may establish a separate account to defray attorney's fees and other related legal costs incurred for the candidate's or officer's legal defense if the candidate or officer is subject to one or more civil or criminal proceedings or administrative proceedings arising directly out of the conduct of an election campaign, the electoral process, or the performance of the officer's governmental activities and duties.

[1] Except for this sentence, the remainder of this memorandum is unchanged from the earlier memorandum of May 23, 2001.

[2] All statutory references are to the Government Code unless specified otherwise.

> These funds may be used only to defray those attorney fees and other related legal costs.
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> "(b) A candidate may receive contributions to this account that are not subject to the contribution limits set forth in this article. However, all contributions shall be reported in a manner prescribed by the commission.
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> "(c) Once the legal dispute is resolved, the candidate shall dispose of any funds remaining after all expenses associated with the dispute are discharged for one or more of the purposes set forth in paragraphs (1) to (5), inclusive, of subdivision (b) of Section 89519."

Section 85304 provides in subdivision (a) that a candidate for elective state office or an elected state officer *may* establish a separate account, not subject to the contribution limits established by Proposition 34, to raise funds to pay legal costs associated with the conduct of a statewide election campaign or legal costs associated with that person's official duties. The language is permissive, such that a candidate is not required to establish a separate account for legal defense funds. Rather, a candidate may choose instead to use her campaign funds to defray such legal costs, consistent with Section 89514.[3] If, however, he or she wishes to raise funds in excess of the contribution limits imposed on campaign funds, subdivision (b) provides the candidate or officer may do so if he or she establishes such an account under this section. Once the legal dispute resolves, any funds in excess of legal costs may be disposed of in the same manner as surplus campaign funds. (Subd. (c).)

Proposed Regulation 18530.4, Attachment A, seeks to resolve several issues identified thus far with the implementation of Section 85304. For instance, the question arises whether a candidate or officeholder should establish a separate committee, apart from the campaign committee, to collect and disburse legal defense funds. As a corollary, the Commission is asked to decide whether a candidate or committee should be allowed or ought to establish a separate legal defense fund for different civil, criminal or administrative proceedings. The statute also indicates the Commission is to decide the frequency and manner of reporting of legal defense fund activity. With regard to funds existing after conclusion of the underlying legal matter, the statute allows transfer to other campaign accounts. The Commission also is asked to decide how and under what

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[3] "**89514. Use of Campaign Funds for Attorney's Fees.**
"Expenditures of campaign funds for attorney's fees and other costs in connection with administrative, civil, or criminal litigation are not directly related to a political, legislative, or governmental purpose except where the litigation is directly related to activities of a committee that are consistent with its primary objectives or arises directly out of a committee's activities or out of a candidate's or elected officer's activities, duties, or status as a candidate or elected officer, including, but not limited to, an action to enjoin defamation, defense of an action to enjoin defamation, defense of an action brought for a violation of state or local campaign, disclosure, or election laws, and an action arising from an election contest or recount."

strictures that transfer may occur. Also, the Commission may wish to ensure that legal defense funds, not subject to contribution limitations, do not inadvertently become a loophole around those limitations.

Subdivision (a):

Subdivision (a) of Regulation 18530.4 requires that a candidate or officeholder establish a committee separate from his or her campaign committee in which to raise legal defense funds. This is a departure from the "one bank account" rule in Section 85201 (and pertinent regulations) that requires one committee per candidate for each election and only one account for that committee. Section 85304, however, serves as a legal basis for creating a distinction. Based on staff analysis and input from the regulated community, staff has drafted subdivision (a) to require candidates and officeholders to establish a separate committee and bank account for legal defense funds. Staff recommends establishing a separate account and committee because it will be easier to distinguish which funds are raised under campaign contribution limits versus those raised for legal defense without limitation. With simple segregation there also is less likelihood of mistaken commingling of funds due to accounting errors. Finally, subdivision (b) of Section 85304 lifts contribution limits for funds raised into "this account." This suggests that if one wishes to raise funds in excess of the contribution limits one must use a separate account. Comments from interested persons indicates widespread support for such a system, as well.[4]

The Commission may recall from its consideration of the *In re Pelham* decision that the city of Los Angeles, which also provides for legal defense funds for municipal elections, requires an official create separate defense funds for different proceedings and name each fund with reference to the specific civil, criminal or administrative action. Thus, staff wished to present the Commission with a similar option. **Decision 1, options A and B**, concern the scenario where a candidate/officeholder faces more than one proceeding. For instance, an official may face a civil proceeding arising from conduct of his or her campaign and another proceeding arising from his or her officeholder activities. The question posed is whether her or she may/should be allowed to establish more than one fund or whether he or she should only be allowed to maintain one fund for all proceedings regardless of whether they are related. Since, and unlike Los Angeles, there are no contribution limits to legal defense funds raised under Section 85304, there is no practical impact on the amount or use or raising of legal defense funds under either option, *while the actions are pending*. The practical impact, if any, occurs when one or more proceedings conclude and any excess funds are disbursed under subdivision (c) of the statute. To the extent officials are permitted to create separate accounts for each proceeding, they may be able to disburse excess funds sooner than would otherwise occur if only one fund were permitted for all legal proceedings.[5] Staff supports **option A**,

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[4] An interested persons meeting was held on May 11 in Los Angeles.

[5] Subdivision (c) of 85304 permits distribution of excess legal defense funds in the same manner as use of surplus campaign funds, as governed by subdivisions (b)(1)-(5) of Section 89519. Those subdivisions state:

"(b) Surplus campaign funds shall be used only for the following purposes:

which calls for a single bank account established by a separate committee for legal defense funds.

Subdivision (b):

Subdivision (b) of Section 85304 provides the Commission shall prescribe the manner in which contributions to legal defense funds shall be reported. In subdivision (b) of the draft regulation, staff proposes three options for **Decision 2:** Option "A" provides for semi-annual reporting and option "B" provides for quarterly filing.[6] Option "C" would impose the same filing schedule as the candidate/officeholder follows for campaign reports under Chapter 4 (disclosure) and/or Chapter 5 (contribution limits and electronically filed reports) - generally, semi-annual reports in non-election years and additional pre-election reports in election years. Also, option "C" results in reporting just as a controlled candidate committee (late contribution reports, etc.). Under its general authority to promulgate regulations to carry out the purposes and provisions of the Act, the Commission has this wide range of options. (§ 83112.)

In Los Angeles, candidates make quarterly filings reporting the activities of their legal defense fund account. While each of the options above has attributes, **Option B**, which provides for quarterly filing, may best balance the burden of reporting and the need for timely disclosure of account activity.

Subdivision (c):

This subdivision of the regulation provides common sense clarification that, in creating a separate committee for raising legal defense funds, the fund and committee are not subject to the requirements of Section 85200 (filing of a candidate statement of intention), 85201 (the single campaign bank account rule) and 85402 (lifting of expenditure limits in campaigns where an opponent contributes personal funds to his or her own campaign in excess of the limits).

"(1) The payment of outstanding campaign debts or elected officer's expenses.

"(2) The repayment of contributions.

"(3) Donations to any bona fide charitable, educational, civic, religious, or similar tax-exempt, nonprofit organization, where no substantial part of the proceeds will have a material financial effect on the former candidate or elected officer, any member of his or her immediate family, or his or her campaign treasurer.

"(4) Contributions to a political party committee, provided the campaign funds are not used to support or oppose candidates for elective office. However, the campaign funds may be used by a political party committee to conduct partisan voter registration, partisan get-out-the-vote activities, and slate mailers as that term is defined in Section 82048.3.

"(5) Contributions to support or oppose any candidate for federal office, any candidate for elective office in a state other than California, or any ballot measure."

[6] Under either option "A" or "B," the instructions to the Form 460 should be changed to reflect their use as reporting mechanisms for legal defense funds.

Subdivision (d):

This subdivision "codifies" the Commission's decision in *In re Pelham*, O-00-274, which construed Section 85304 to govern elected state officers or candidates for elective state office regardless of whether they also are a local candidate or officeholder.

Subdivision (e):

Decision 3: This optional subdivision requires that legal defense funds raised be "reasonably necessary" to defray the costs associated with defense of the candidate-officeholder. In so doing, this subdivision of the regulation construes the statute's language in subdivision (a) that allows funds to be raised only "to defray attorney's fees and other related legal costs...." (§ 85304, subd (a).) While the standard "reasonably necessary" admittedly is subject to interpretation, this language works to prevent the most blatant abuses where a candidate solicits a single $500,000 contribution to defend a routine late-filing accusation. Staff recommends inclusion of the bracketed language.

Subdivision (e/f):

Decision 4: An optional subdivision. As discussed above in the context of subdivision (a) of the regulation, the statute allows use of excess legal defense funds in the same manner as surplus campaign funds - specifically, subdivisions (b)(1) through (5) of Section 89519. (See footnote 4, *supra*.) Subdivision (b)(1) allows surplus funds to be used for "payment of outstanding campaign debts or elected officer's expenses." (§ 89519, subd. (b)(1).) Section 85304, however, is clear that funds may be raised in excess of contribution limits only to "defray" costs associated with legal defense. The last subdivision of the draft regulation harmonizes the two statutes and forecloses a potential loophole whereby unlimited contributions could be funneled back into a campaign bank account. Accordingly, the language in **Option A** limits transfer to the amounts otherwise applicable to campaign contributions and for the sole purpose of reimbursing the campaign committee for litigation costs it may have covered. **Option B**, on the other hand, allows transfer regardless of whether the campaign account incurred expense but requires the transfer be subject to the normal campaign contribution limits and attribution requirements. In addition to these two options, the Commission may also decide to require more stringent attribution, such as attribution of the actual amount a given contributor gave.

Subdivision (e/f/g):

In the event the Commission chooses to allow a candidate to establish more than one legal defense fund account, this subdivision emphasizes that the account(s) must be kept separate from any campaign or personal fund accounts.

2. SECTION 85700 – RETURN OF CONTRIBUTIONS LACKING DONOR INFORMATION

Overview

Section 85700 governs the return of contributions under certain circumstances:

> "A candidate or committee shall return within 60 days any contribution of one hundred dollars ($100) or more for which the candidate or committee does not have on file in the records of the candidate or committee the name, address, occupation, and employer of the contributor."

To implement this statute, a regulation must specify when the 60-day period begins to run, and what one must do if the contribution cannot be returned to the contributor. In some jurisdictions, such as Los Angeles, the recipient is not allowed to deposit a contribution until all of the donor information is acquired. Section 85700, on the other hand, is silent on that issue. Finally, some interested persons and staff have proposed that, if the statute is to have real effect, a recipient must file amended campaign statements to include all of the donor information if the contribution has been deposited without such information. One representative of filers maintains that including the information in the recipient's records should satisfy the demands of the statute.

After meeting with interested persons and holding in-house discussions[7], staff recommends the Commission move forward with the language contained in draft Regulation 18570, Attachment B. A discussion of each subdivision and the respective issues posed follows.

Subdivision (a):

Subdivision (a) of the draft regulation identifies when the 60-day period for gathering the donor information begins to run. The words "obtains possession or control" tracks existing language used by the Commission to define when a contribution is received. (See Reg. 18421.1, subd. (c).)

Subdivision (b):

Subdivision (b) addresses the question whether a candidate or committee may deposit the contribution pending receipt of the donor information. The Commission may recall from its consideration of the *In re Pelham* opinion request that in Los Angeles committees are not allowed to deposit or otherwise negotiate the contribution until all of the donor information is received. **Decision 1** presents the Commission with the option of either allowing or forbidding a candidate or committee to deposit the contribution before all of the donor information is obtained.

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[7] An interested persons meeting was held in Los Angeles on May 11.

Staff has not identified serious drawbacks to either approach. Regardless of whether a contribution is deposited or otherwise negotiated, a recipient must report any contributions "received" during the period covered by a campaign statement. (§84211, subd. (a).) Once the recipient "obtains possession or control" of the contribution, then it must be reported, regardless of whether it has been deposited. (Reg. 18421.1.) Thus, prohibiting the recipient from depositing the contribution does not simplify reporting, since the receipt of the contribution already must be reported. Comments from some interested persons have suggested, however, that allowing deposit (and thereby use) of the contribution only after all of the information is obtained ("Option B") will encourage faster compliance with the Act's reporting requirements.

An important wrinkle factors in the equation when one considers electronic deposits, which can be done automatically into a recipient's campaign account without knowledge of the recipient (such as credit card contributions). If the Commission opts to preclude deposit before the information is received, the regulation may need specific language to require a recipient set up to receive electronic contributions also require that the transfer cannot take place unless all of the required fields (containing the requisite donor information) are correctly filled out.

Subdivision (c):

This subdivision address two points: 1) when the contribution is deemed returned, and 2) what the recipient must do with contributions if the contributor cannot be located or refuses return of the contribution.

The first sentence of subdivision (c) identifies when the contribution is deemed returned for purposes of compliance with the statute. A recipient committee will comply with the deadline imposed by the statute if the day on which the contribution is mailed, delivered or otherwise transmitted to the contributor is within 60 calendar days of the date the recipient received it (as defined under subdivision (a) of this draft regulation).

The second sentence "codifies" advice given by staff recently in *Gillan* Advice Letter, A-01-018, in which candidates for the CalPERS Board were advised how to dispose of contributions when the donor could not be located. The advice request asked whether a recipient who could not locate a contributor to return the contribution could then keep the contribution. Staff advised, analogizing to the disposition of anonymous contributions in Section 84304, that the recipient must forward the contribution to the General Fund of the state.

Decision 2 asks the Commission to decide how much time a recipient has to turn the contribution over to the General Fund (or local general fund - the subject of "Decision 3," below). Option "A" uses the word "promptly." This tracks language used in Section 84304 of the Act, governing the forwarding of anonymous contributions to the General Fund of the state.[8] Option "B" allows a 30-day cushion after expiration of the initial 60-day period, to forward the contribution to the General Fund. This extra time allows for delays caused by the back and forth of mail delivery and efforts to locate a contributor. Option "C" allows no extra time beyond the 60 days provided in the statute. Under this narrow construction of the statute, a recipient would have 60 days to locate and successfully return the contribution to the contributor or forward it to the General Fund. If the recipient still had the funds on the 61st day, the recipient would be in violation of the regulation and statute.

Decision 3 gives the Commission the option to allow candidates and committees, if they wish, to forward the amount of the contribution to a general fund of a local jurisdiction instead of the General Fund of the state. This option was suggested at an interested persons meeting. As shown above, the statute is silent as to where the funds shall go if they cannot be returned to the contributor. While there is no apparent prohibition to forwarding the contribution to a local jurisdiction, to make such a provision in the regulation may appear inconsistent with the treatment of anonymous contributions (see Section 84304, at footnote 7) in the context of state campaigns.

Subdivision (d):

This subdivision requires a recipient to keep a record of the date when one receives occupation and employer information. With this information one can ascertain whether the committee complied with the requirement to return monies if the occupation and employer information was not received on time.

Subdivision (e):

The contribution-return mandate of Section 85700 applies where the candidate or committee does not have "on file in the records of the candidate or committee" the requisite donor information. A policy issue has arisen as to whether the candidate or committee should be required to file amended campaign reports once that information is obtained. **Decision 4** presents optional subdivision (e), which requires the committee or candidate to file amended campaign reports to disclose the requisite donor information. **Options A and B** present language that gives the candidate or committee a deadline for filing such amendments. **Option A** requires amendment in 60 days. **Option B** allows for another unspecified time period.

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[8] "**84304. Anonymous Contributions.**
"No person shall make an anonymous contribution or contributions to a candidate, committee or any other person totaling one hundred dollars ($100) or more in a calendar year. An anonymous contribution of one hundred dollars ($100) or more shall not be kept by the intended recipient but instead shall be promptly paid to the Secretary of State for deposit in the General Fund of the state."

Proponents of an amended filing requirement argue that the purpose of obtaining the donor information is to disclose to the public who is supporting a given candidate or cause. By requiring return of a contribution that does not disclose all of the information required by law, the voters have decided that if the public does not have full information, the contribution must be returned. Accordingly, to allow a candidate or committee to accept and use the contribution and never file documents disclosing this donor information would contravene the voters' intent.

While no provision in the Act explicitly calls for the filing of amended campaign statements, the authority for requiring an amended filing arguably exists by virtue of several provisions in the Act. Section 84211 identifies the contents of campaign reports and requires the contributor's name, address, occupation and employer be disclosed. (§ 84211, subd. (f)(1)-(4).) Section 84213 requires campaign statements be verified for their accuracy. The regulation interpreting that section, Regulation 18427, describes the duties of treasurers and candidates with respect to campaign statements, and requires correction of "any inaccuracies or omissions in campaign statements of which the treasurer knows...." (Reg. 18427, subds. (a)(5) and (c)(4).) Thus, if a treasurer or candidate acquires information required to be disclosed by Section 84211, and previously has filed a campaign statement which omits that information, the treasurer or candidate arguably is required to amend the filing.

Representatives of some filers maintain that nothing in the statute requires filing of amendments. Rather, the only requirement of the statute is that the information be "on file in the records of the candidate or committee" so that the recipient may use the contribution after 60 days. Also, these representatives state that a requirement to file possibly multiple amendments is both overly burdensome and expensive. Given that some filings must be done electronically and that one must file an *entire* new report (as opposed to amending merely one page of a report), opponents maintain that such a requirement would overwhelm candidates and their treasurers. At least one filer believes the intent of the law was not 100% disclosure at all costs, but to provide leverage to ensure that donor information be obtained and reported as frequently as possible.[9]

There is not a consensus among staff whether requiring a candidate to amend a filing is appropriate. The debate follows much the same contour as discussed above. Those opposed to requiring an amendment point out the significant burden on electronic filers where entire lengthy reports must be redone and refiled to make only a small change on one line of the report. On the other hand, the Enforcement Division has suggested that failure to file an amendment may be construed as a violation of the Act's reporting requirements. If true, this fact would counsel in favor of stating the requirement in the regulation to ensure the public is aware of its duties under the Act.

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[9] Such leverage would be increased to the extent that the Commission decides, in **Decision 1, option B**, not to allow a recipient to deposit or use a contribution before all of the information is obtained. Arguably, this would encourage a recipient to obtain, or a donor to provide, the requisite information as soon as possible, and thereby increase the likelihood it would appear on campaign statements.

3. SECTION 85308 – CONTRIBUTIONS BY MINORS

Section 85308 governs family contributions:

> "(a) Contributions made by a husband and wife may not be aggregated.
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> "(b) A contribution made by a child under 18 years of age is presumed to be a contribution from the parent or guardian of the child."

In *In re Pelham*, O-00-274, the Commission construed Section 85308 to establish a rebuttable presumption that a contribution from a minor is actually from the parent or guardian of the child. The Commission instructed staff to research, among other things, how the presumption is to be rebutted. Issues to consider include the capacity of minors to make verifications or sworn statements, the type and timing of documentation to rebut the presumption, the source of the funds used by the minor, the use of sworn verifications from parents, record-keeping by campaigns, and others.

Decision: Should the Commission adopt a regulation this year? After meetings with agency personnel and interested persons, staff recommends that the Commission postpone adoption of a regulation. Input from the regulated community indicates that the need for a regulation is minimal, given the relative infrequency of such contributions. Staff and interested persons believe that the regulated community can be guided adequately via the advice letter process and Technical Assistance Division. It is recommended that existing resources be devoted to more pressing needs. After the benefit of some experience with the statute, the Commission will better be able to assess whether this problem merits a regulation.

Attachments:
Regulation 18530.4
Regulation 18570